

SERVICE DATE — FEBRUARY 11, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35981

FINCH PAPER LLC—PETITION FOR DECLARATORY ORDER

Decided: February 10, 2016

By petition filed on December 7, 2015, Finch Paper LLC (Finch Paper) seeks a declaratory order that certain practices and actions by Delaware and Hudson Railroad d/b/a CP Rail (CP Rail) relating to CP Rail's assessment of demurrage charges against Finch Paper are unreasonable practices in violation 49 U.S.C. §§ 10702 and 10746. Finch Paper submitted a proposed procedural schedule. CP Rail filed a reply on December 28, 2015, in which it opposes the schedule.

This matter was referred by the United States District Court for the Northern District of New York on November 10, 2015, in Delaware & Hudson Railway v. Finch Paper LLC, No. 1:15-cv-00417-TJM-TWD. CP Rail initiated the court procedure to collect \$1,349,050 in demurrage and \$9,158 in other charges assessed by CP Rail against Finch Paper between 2013 and 2015. Finch Paper filed a counterclaim alleging that CP Rail had failed to comply with its obligations established by 49 U.S.C. § 11101. The district court stayed the court proceeding pending the Board's ruling on the referred issues.

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321¹ to issue a declaratory order to terminate a controversy or to remove uncertainty. Petitions for issuance of a declaratory order premised on a court referral are routinely accepted. Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C.2d 675, 676 (1989).

These matters have been referred by a court of competent jurisdiction and otherwise appear to be within the Board's primary jurisdiction. Pursuant to the Board's authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, a proceeding will be instituted to resolve the controversies at issue here. The Board will consider these matters under the modified procedure rules at 49 C.F.R. part 1112.

The procedural schedule proposed by Finch Paper completes discovery in 120 days (from the service date of the decision instituting a declaratory order proceeding) and allows 30 days for Finch Paper's rebuttal statement. CP Rail has proposed 90 days for discovery and suggests 15

¹ The Surface Transportation Board Reauthorization Act of 2015, Public Law No. 114-110, recodified certain provisions of title 49, United States Code, redesignating 49 U.S.C. § 721 as § 1321.

days for Finch Paper's rebuttal. The Board has considered the parties' arguments in regard to the proposed schedule. The procedural schedule set forth below provides that discovery be completed 105 days from the date the Board institutes this proceeding, and Finch Paper will be allotted 20 days for submission of its rebuttal. As suggested by the parties in their respective proposed schedules, Finch Paper will be allotted 30 days to submit its opening statement after the close of discovery and CP Rail will be allotted 30 days to submit its reply statement.

It is ordered:

1. A declaratory order proceeding is instituted.
2. All parties must comply with the Rules of Practice at 49 C.F.R. subchapter B including 49 C.F.R. parts 1112 and 1114.
3. Discovery will be completed by May 26, 2016.
4. Finch Paper's opening statement is due by June 27, 2016.
5. CP Rail's reply statement is due by July 25, 2016.
6. Finch Paper's rebuttal statement is due by August 15, 2016.
7. This decision is effective on its service date.
8. A copy of this decision will be mailed to:

The Honorable Thomas J. McAvoy, Senior U.S. District Judge
United States District Court for the Northern District of New York
15 Henry Street
Binghamton, NY 13901

By the Board, Rachel D. Campbell, Director, Office of Proceedings.